

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE



455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CALIFORNIA 94102-7004

Public: (415) 510-4400
Telephone: (415) 510-3814
Facsimile: (415) 703-1234
E-Mail: JenniferA.Lee@doj.ca.gov

May 24, 2019

Christopher Schiano
MuckRock News DEPT MR 64334
411A Highland Ave
Somerville, MA 02144
64334-39189767@requests.muckrock.com

Via E-mail

RE: Public Records Act Request (DOJ PRA No. 2018-02422)

Dear Mr. Schiano:

This letter is in response to your request for public records, which was received by the California Department of Justice (DOJ) on December 7, 2018, in which you sought records pursuant to the Public Records Act as set forth in Government Code section 6250 et seq.

Specifically, you requested the following records: "Any email sent or received by any employee of your agency between November 24, 2018 and November 27, 2018 which includes the keywords 'tear gas' and/or 'teargas'."

On December 17, 2018, we sent you a letter extending our time to respond to this request.

On December 26, 2018 we sent you a letter stating our intent to produce responsive, non-exempt records to you on a rolling basis. The first group of such documents was attached.

On February 7, 2019 we sent you a letter reiterating our intent to produce responsive, non-exempt records to you on a rolling basis. The second group of such documents was attached.

On April 4, 2019 we sent you a letter reiterating our intent to produce responsive, non-exempt records to you on a rolling basis. The third group of such documents was attached.

With this letter, we are producing the fourth and final group of non-exempt documents responsive to your request. Please be advised that there may be responsive records that are exempt from disclosure in whole or in part under the following exemptions.

Preliminary Drafts Exemption: Government Code section 6254, subdivision (a) exempts “[p]reliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure” from mandatory disclosure under the Public Records Act. Thus, to satisfy this exemption, a record must satisfy three prongs. First, it must be a preliminary draft, note, etc. Second, the record must not be one that is retained in the ordinary course of business. Third, the public interest in withholding the data must outweigh the public interest in disclosing the data. (See *Center for a Better Environment v. Department of Food & Agriculture* (1985) 171 Cal.App.3d 704, 711-712.)

Pending Litigation Exemption: Agencies may withhold the disclosure of records pertaining to pending litigation to which the public agency is a party until the pending litigation has been finally adjudicated or otherwise settled. (Gov. Code, § 6254 subd. (b).) The pending litigation exemption does not duplicate the attorney work product exemption but is broader and covers documents prepared by the agency in anticipation of, or for use in, litigation. (*County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 831; *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1422.)

Investigative Records Exemption: Government Code section 6254, subdivision (f) exempts from disclosure investigatory and security files of the Attorney General and the Department of Justice, the Office of Emergency Services, and any state or local police agency. (See *Dick Williams v. Superior Court* (1993) 5 Cal.4th 337, 354.) Investigative records do not lose their exempt status due to a failure to prosecute, or the close of an investigation. (*Id.* at p. 355 [“While there may be reasons of policy that would support a time limitation on the exemption for investigatory files, such a limitation is virtually impossible to reconcile with the language and history of subdivision (f).”].)

Intelligence Information Exemption: The Public Records Act exempts from disclosure records of intelligence information of the office of the Attorney General and the Department of Justice, the Office of Emergency Services, and any state or local police agency. (Gov. Code, § 6254, subd. (f).)

Attorney Work-Product and Attorney-Client Privilege Exemption: Confidentiality privileges set forth elsewhere in law, including the attorney-client privilege contained in Evidence Code section 954 (which protects confidential communications between the attorney and the client) and the attorney work-product privilege contained in Code of Civil Procedure section 2018.030 (which protects any writing reflecting an attorney’s impressions, conclusions, opinions, legal research, or legal theories that is maintained as confidential) are incorporated into the Public Records Act. (Gov. Code, § 6254, subd. (k); *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363; *County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 833.)

The attorneys in our department provide legal advice to the Attorney General and his designees and prepare confidential analyses as part of their work. Accordingly, communications between the Attorney General or his designees and the department’s attorneys, and analyses

prepared by those attorneys are privileged materials exempt from disclosure under the Public Records Act.

Criminal History Information Exemption: Criminal history information (often referred to as “Criminal Offender Record Information” or “CORI”) taken from DOJ’s state summary of criminal history information and/or other sources of criminal history information may only be disseminated to statutorily authorized agencies. (See Pen. Code, § 11076.) Persons making Public Records Act requests are not authorized by statute to have this information. (See, e.g., Pen. Code, § 11105, subd. (b) [identifying persons authorized to receive state summary criminal history information].) These prohibitions are incorporated as exemptions into the Public Records Act. (Gov. Code, § 6254, subd. (k).)

Official Information Exemption: A public entity may refuse to disclose “information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made” when disclosure is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice. (Evid. Code, § 1040.) This privilege is incorporated as an exemption into the Public Records Act. (Gov. Code, § 6254, subd. (k).)

U.S. Intelligence Activities Exemption: Information related to United States intelligence activities may only be disseminated to statutorily authorized government agencies. (Exec. Order No. 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981).) This prohibition is incorporated as an exemption into the Public Records Act. (Gov. Code, § 6254, subd. (k).)

Security and Integrity of Computer Systems Exemption: The Public Records Act exempts from disclosure records that would reveal vulnerabilities to, or otherwise increase the potential for an attack on, an information technology system of a public agency. (Gov. Code, § 6254.19.)

Deliberative Process Exemption: The deliberative process privilege exempts from disclosure materials that would expose an agency’s decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions. Even if the content of a document is purely factual, it is nonetheless exempt from public scrutiny if it is actually related to the process by which policies are formulated or, if it is inextricably intertwined with policymaking processes. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.) Records that reveal deliberative processes are exempt under Government Code section 6255 when the public interest in disclosure is outweighed by the public interest in non-disclosure. (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 306.)

Public Policy Exemption: The Public Records Act exempts the disclosure of records or information when, “on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” (Gov. Code, § 6255, subd. (a).)

Christopher Schiano
May 24, 2019
Page 4

This completes our response to your request.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jennifer Lee".

JENNIFER LEE
Deputy Attorney General
Government Law Section

For XAVIER BECERRA
Attorney General

JAL:
cc: Public Records Coordinator